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Teow Tek Soon v Koay Chin Teong

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)(W)-1349–07 OF 2016
ALIZATUL KHAIR, NALLINI PATHMANATHAN AND ZABARIAH YUSOF JJCA
10 AUGUST 2017

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Civil Procedure — Appeal — Decision of trial judge — Trial judge rejected plaintiff's claim that he had oral agreement for sale of his company shares at RM10.71 per unit — Trial judge felt duty-bound to determine the actual price of the shares, adopted price of RM3.67 per share as valued in an accountant's report and granted the plaintiff judgment for the shares at that price — Plaintiff had never pleaded the price of RM3.67 per share — Whether trial court erred in deciding the case on unpleaded issue — Whether trial court should have either accepted case put forward by plaintiff or rejected the same — Whether trial court was wrong to have formulated and made out case for plaintiff by finding that he was entitled to a share price of RM3.67 per unit

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The appellant ('Teow'), respondent ('Koay') and another person ('Ang') were directors and shareholders of a company. Shortly after he resigned from the company, Koay sold to Teow and Ang, respectively, 147,500 and 132,501 of his shares in the company at a consideration of RM1 per share as stated in the share transfer forms ('Form 32A'). Apart from the Form 32A, there was no written share sale agreement to evidence the sale. In a suit filed in the High Court against Teow and Ang, Koay contended that despite what was stated in the Form 32A, the parties had an oral agreement that the sale price of the shares was RM10.71 per unit. Teow denied the allegation (Ang did not attend the trial) contending that the agreed sale price was as stated in the Form 32A and that his and Ang's payment for the shares was set off against debts that Koay owed them. Evidence was adduced at the trial that an accountant's firm had prepared a report in January 2010 valuing the shares at RM3.67 per unit. The trial court ruled, inter alia, that although Koay had failed to prove the price that he claimed for the shares, the court had a duty to determine the actual price of the shares and, based on the accountant's report, adopted the price of RM3.67 per share. Multiplying that figure against the number of shares that was transferred to Teow and Ang, the trial court granted Koay judgment against Teow and Ang in the sums of RM541,325 and RM486,278.67, respectively. Only Teow appealed against the decision to the Court of Appeal.

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Held, allowing the appeal and setting aside the High Court's decision:

(1) The High Court erred in granting judgment for Koay based on the unpleaded share purchase price of RM3.67 per share. Having found that Koay failed to prove his claim for the purchase price of RM10.71 per share, the trial judge erred in law and in fact when she went on to hold that the court was entitled and duty-bound to decide on the actual purchase price of the shares. The trial court erred in finding that the actual purchase price of the shares was RM3.67 per unit despite the fact that price was never pleaded but only raised by Koay's counsel during submissions. The trial court should have either accepted or rejected the case put forward by Koay. It was not open to the trial court to formulate and make out a case for Koay by finding that he was entitled to the sale price of the shares at RM3.67 per unit (see paras 30, 32 & 43).

(2) Even if the parties had agreed to falsify the consideration sum in the share transfer forms (which would have been an illegality), the trial judge should not have awarded Koay the share price as computed in 2010 by the accountants because the share transfers took place on 13 November 2007. If at all Koay was entitled to judgment, it should have been based on the share price as at 2007 which the accountants found to be RM2.67 per unit. Barring any convincing evidence to the contrary, the purchase price of the shares had to be taken as RM1 per unit as stated in the Form 32A (see paras 35–36).

(3) Koay's action against Teow and Ang was, in any event, barred by limitation under s 6 of the Limitation Act 1953 (see paras 39 & 42).

[Bahasa Malaysia summary

Perayu ('Teow'), responden ('Koay') dan seorang lagi ('Ang') merupakan pengarah-pengarah dan pemegang saham sebuah syarikat. Sejurus selepas dia meletak jawatan daripada syarikat itu, Koay telah menjual kepada Teow dan Ang, masing-masing, 147,500 dan 133,501 daripada sahamnya dalam syarikat itu pada balasan RM1 untuk setiap saham sepertimana dinyatakan dalam borang pindak milik saham ('Borang 32A'). Selain daripada Borang 32A, tiada perjanjian jualan saham secara bertulis untuk menjadi bukti jualan itu. Dalam guaman yang difailkan di Mahkamah Tinggi terhadap Teow dan Ang, Koay berhujah bahawa meskipun apa yang dinyatakan dalam Borang 32A, pihak-pihak mempunyai perjanjian secara lisan bahawa harga jualan saham adalah RM10.71 setiap unit. Teow menafikan pengatan itu (Ang tidak menghadiri perbicaraan) dengan berhujah bahawa harga jualan yang dipersetujui adalah sepertimana diayatakan dalam Borang 32A dan bahawa bayarannya dan Ang untuk saham itu telah ditolak dengan hutang yang Koay berhutang kepada mereka. Keterangan telah dikemukakan semasa perbicaraan bahawa firma akauntan telah menyediakan laporan dalam bulan Januari 2010 yang menilai saham pada RM3.67 setiap unit. Mahkamah perbicaraan memutuskan, antara lain, bahawa meskipun Koay telah gagal membuktikan harga yang dituntut untuk saham itu, mahkamah mempunyai kewajipan

untuk menentukan harga sebenar saham itu dan, berdasarkan laporan akauntan, menggunakan harga RM3.67 setiap unit. Dengan menggandakan angka tersebut dengan bilangan saham yang telah dipindah milik kepada Teow dan Ang, mahkamah perbicaraan telah memberikan Koay penghakiman terhadap Teow dan Ang berjumlah RM541,325 dan RM486,278.67, masing-masing. Hanya Teow telah merayu terhadap keputusan itu kepada Mahkamah Rayuan.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Mahkamah Tinggi terkhilaf dalam memberikan penghakiman untuk Koay berdasarkan harga belian saham yang tidak dipli sejumlah RM3.67 setiap saham. Setelah mendapati bahawa Koay telah gagal membuktikan tuntutannya untuk harga belian RM10.71 setiap saham, hakim perbicaraan terkhilaf dari segi undang-undang dan fakta apabila beliau memutuskan bahawa mahkamah berhak dan terikat dengan kewajipan untuk memutuskan berhubung harga belian sebenar saham itu. Mahkamah perbicaraan telah terkhilaf keran mendapati bahawa harga belian sebenar saham adalah RM3.67 setiap unit meskipun pada hakikatnya harga tersebut tidak pernah dipli tetapi hanya ditimbulkan oleh peguam Koay semasa penghujahan. Mahkamah perbicaraan sepatutnya sama ada menerima atau menolak kes yang dikemukakan oleh Koay. Ia tidak terbuka kepada mahkamah perbicaraan untuk merumuskan dan membuat kes untuk Koay dengan mendapati bahawa dia berhak kepada harga jualan saham pada RM3.67 setiap unit (lihat perenggan 30, 32 & 43).

(2) Walaupun jika pihak-pihak telah bersetuju untuk memalsukan jumlah balasan dalam borang pindah milik saham itu (yang menjadi suatu yang menyalahi undang-undang), hakim perbicaraan tidak patut mengawardkan Koay harga saham sepertimana dikira pada 2010 oleh akauntan kerana pindah milik saham itu telah berlaku pada 13 November 2007. Jikapun Koay berhak kepada penghakiman itu, ia patut berdasarkan harga saham sehingga 2007 yang mana akauntan mendapati ia adalah RM2.67 setiap unit. Dengan menyekat apa-apa keterangan bertentangan yang meyakinkan, harga belian saham itu perlu diambil pada RM1 setiap unit sepertimana dinyatakan dalam Borang 32A (lihat perenggan 35–36).

(3) Tindakan Koay terhadap Teow dan Ang adalah, dalam apa keadaan, disekat oleh had masa di bawah s 6 Akta Had Masa 1953 (lihat perenggan 39 & 42).]

Notes

For cases on decision of trial judge, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1174–1179

Cases referred to

Blay v Pollard & Morris [1930] 1 KB 628, CA (refd)
Carlyle v Royal Bank of Scotland plc [2015] UKSC 13, SC (refd)
Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409; [1991] 2 CLJ 871; [1991] 1 CLJ Rep 69, SC (refd)
Elliston v Glencore Services (UK) Ltd [2016] EWCA Civ 407, CA (refd)
FAGE UK Ltd and another v Chobani UK Ltd and another [2014] EWCA Civ 5; [2014] ETMR 26, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Henderson v Foxworth Investments Ltd and another [2014] UKSC 41, SC (refd)
Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuah, deceased) v Superintendent of Lands & Survey & Anor [2013] 3 MLJ 666; [2012] 1 LNS 969, CA (refd)
B (A Child) (Care Proceedings: Threshold Criteria), In re [2013] 1 WLR 1911, SC (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196; [1971] 1 LNS 42 (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd)
Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal [2015] 6 MLJ 492; [2015] 9 CLJ 153, FC (refd)
Thomas v Thomas [1947] AC 484, HL (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
UEM Group Berhad (Dahulunya Dikenali Sebagai United Engineers (Malaysia) Berhad) v Genisys Integrated Engineers Pte Ltd & UEM Genisys Sdn Bhd and another appeal [2010] MLJU 2179; [2010] 2 MLRA 668, FC (refd)
Watson Farley and Williams (a firm) v Ostrovizky [2015] EWCA Civ 457, CA (refd)
Yuill v Yuill [1945] P 15, CA (refd)

Legislation referred to

Limitation Act 1953 s 6
Securities Industry Act 1983 Form 32A

Appeal from: Suit No 22NCVC-1–01 of 2015 (High Court, Pulau Pinang)

Kanesh Sundrum (Kanesh Sundrum & Co) for the appellant.
Simon Tan Hong Jin (Ooi Chin Zin with him) (Aswar Simon & Azhar) for the respondent.

Nallini Pathmanathan JCA:

INTRODUCTION

[1] The appeal before us raised two main issues for determination. *Firstly, whether there was a valid oral agreement to vary the purchase price of shares sold by the respondent/plaintiff ('the plaintiff') to the appellant/first defendant ('the first defendant') and to the second defendant, who is not a party to this appeal.*

[2] It is not in dispute that there was no written sale of shares agreement executed between the parties. Therefore, the only documents adduced to support the sale of shares from the plaintiff to the first defendant and the second defendant were the share transfer forms, Form 32A. The plaintiff argued that by virtue of an oral agreement, parties had agreed upon a purchase price for the shares far higher than that recorded in the share transfer forms, ie RM1 per unit. The High Court did not agree with the submission of the plaintiff that the parties had agreed upon the purchase price of RM10.71 per unit. However, the High Court found that parties had agreed upon the purchase price of RM3.67 per unit.

[3] *The second issue raised was whether the first defendant and the second defendant had paid the purchase price of the shares to the plaintiff.*

[4] Learned counsel for the first defendant submitted that the price had been set off by a contra arrangement involving another debt owed by the plaintiff to the first defendant and the second defendant. The High Court rejected this submission and held that the first defendant and the second defendant were liable to pay the plaintiff the purchase price of the shares, recalculated at RM3.67 per unit.

[5] We allowed the appeal and append the reasons for our decision below. The salient facts are also set out below. The parties will be referred to as they were in the High Court for ease of reference.

SALIENT FACTS

[6] The parties are directors and shareholders of a company known as Champ Steel Sdn Bhd ('Champ Steel').

[7] Champ Steel was established on 30 April 1997 and has a total of 750,000 units of shares selling for RM1 each. It carries out the business of fabrication of steel structures.

[8] The plaintiff resigned as a director of Champ Steel on 30 April 2007.

[9] On 13 November 2007, the plaintiff transferred 147,500 Champ Steel shares to the first defendant and 132,501 Champ Steel shares to the second defendant. This is evidenced in two Form 32A dated 13 November 2007, one for the transfer of shares to the first defendant for a consideration of RM147,500 and another for the transfer of shares to the second defendant for a consideration of RM132,501.

[10] However, the plaintiff claimed that the reason he sold his shares was to settle his debts to his creditors because he had been served with a Bankruptcy Notice No 29–31 of 2007. He needed the sum of RM3m to avoid being made a bankrupt. For this purpose, he claimed he entered an oral agreement with the defendants for the sale of all his shares in Champ Steel to them for the total consideration of RM3m. This would mean that each share of Champ Steel cost RM10.71.

[11] The plaintiff did not explain, either in his statement of claim or his witness statement, the reason why the transfer forms for the shares did not reflect the actual purchase price of the shares. He merely stated in the statement of claim that the alleged deliberate misstatement of the purchase price of the shares in the transfer forms was done by him upon the request of the defendants. During cross-examination, the plaintiff had no reasonable explanation for misstating the purchase price of the shares at RM1 per unit other than that alleging that the first defendant had instructed him to do so.

[12] The first defendant disputed this account by the plaintiff and submitted that the purchase price stated in the transfer forms was correct. Further, the first defendant denied not giving the plaintiff consideration for the shares. The first defendant submitted that the money owed to the plaintiff for the Champ Steel shares had been set off by a contra arrangement for the debts owed by the plaintiff to the defendants.

[13] The plaintiff was adjudged a bankrupt on 7 April 2010. On 10 October 2014, the Insolvency Department granted the plaintiff sanction to commence this action. Subsequently, the plaintiff appointed Messrs Aswar Simon & Azhar as his solicitors and upon his instructions, the said law firm issued a notice of demand dated 3 November 2014 to the defendants. Thereafter, the plaintiff filed the writ on 5 January 2015.

[14] The plaintiff admitted that before the writ was filed, he had not issued a notice of demand for the payment of the money he claimed the defendants owed to him. During cross-examination, the plaintiff alleged that he followed up on the debt by telephone because he was advised by a solicitor that as a bankrupt, he could not legally send the defendants a notice of demand for the debt allegedly owed by them. When pressed by the first defendant's counsel to

reveal the name of the solicitor who allegedly dispensed such advice, the plaintiff avoided answering the question put to him.

[15] When asked why he waited for so long before pursuing his claim against the defendants, the plaintiff alleged that in the telephone calls between him and the defendants, the defendants repeatedly put off the date of payment of the purchase price for the shares with the excuse that they were waiting for the preparation of a share valuation report.

[16] The 'report' was prepared by Messrs Ooi & Associates Chartered Accountants in a letter dated 31 January 2010. This report valued the shares based on the audited accounts as at 31 May 2010 at RM3.67 per unit. The plaintiff alleged that the delay in obtaining a valuation report was due to the fact that he had repeatedly asked the defendants to expedite payment. However, the first defendant submitted that the valuation report was prepared for the second defendant who intended to sell his shares to the first defendant. However, since the second defendant refused to attend court, the High Court judge drew an adverse inference against the first defendant on this issue.

FINDINGS OF THE HIGH COURT

[17] The High Court stated that the second defendant was uncooperative and refused to attend court to testify despite being subpoenaed. On the first hearing date, the second defendant's solicitors informed the court that on the Friday of the preceding week, they had filed an application to be discharged from acting for him on the basis that he did not give them instructions for the conduct of the matter. The High Court allowed the discharge application and proceeded with the hearing in the absence of the second defendant. Therefore, the High Court held that the second defendant had no defence to the plaintiff's claim and based on the second defendant's absence in court, drew an adverse inference against the first defendant.

[18] Significantly, the learned High Court judge stated in the grounds of judgment that he found that the plaintiff had failed to prove the existence of an oral agreement between the parties for the sale of shares at the purchase price of RM3m. However, the learned High Court judge went on to hold that the finding on the existence of the oral agreement did not preclude the court from deciding on the plaintiff's claim because the court had the duty to determine the actual agreed price of the shares.

[19] After undertaking a consideration of the evidence, the High Court held the price of RM10.71 per share as per the plaintiff's claim was too exorbitant. However, the learned High Court judge accepted the submission of the plaintiff's counsel that the plaintiff had, in order to avoid suffering further

losses, acquiesced to the price of RM3.67 per share as per the share valuation report dated 31 January 2010, which valued each share at RM3.67 in the year 2010. Therefore, the High Court recalculated the price of the shares and held that the first defendant owed the plaintiff the sum of RM541,325 while the second defendant owed the plaintiff the sum of RM486,278.67.

[20] The High Court found that the first defendant was not honest in claiming that the full purchase price for the shares had been set off by a contra arrangement. The defendants claimed that the plaintiff owed the first defendant the sum of RM147,500 and owed the second defendant the sum of RM132,501.

[21] In relation to the second defendant's claim, the High Court held that since the second defendant did not testify, and that the first defendant was not qualified to testify on behalf of the second defendant, the claim by the second defendant had not been proven.

[22] In relation to the first defendant, the High Court held that it was improbable that the plaintiff was indebted to the defendants for exactly the same sum as the purchase price of the shares, and there was no admissible evidence to prove that the plaintiff did in fact owe the defendants that sum.

[23] On the issue of limitation, the High Court was of the view that the cause of action only accrued on 31 January 2010, ie the date of the share valuation report. From this report, which valued the shares at RM3.67 per unit, the plaintiff realised that the defendants were not going to pay him the sum of RM3m. The writ was filed on 5 January 2015, ie slightly less than five years from the date the cause of action accrued. Therefore, the plaintiff was not time-barred from filing this claim.

[24] The High Court allowed the plaintiff's claim and entered judgment in terms of paras 14(a) and (b) of the plaintiff's statement of claim, ordering the first defendant to pay the plaintiff the recalculated sum of RM541,325 (instead of the plaintiff's claim for RM1,580,351.50) and the second defendant to pay the plaintiff the sum of RM486,278.67 (instead of the plaintiff's claim for RM1,419,648.50). Both sums were stipulated to be subject to interest at 5%pa calculated from the date of filing of the writ until full realisation.

[25] The High Court dismissed the plaintiff's claim for general damages, holding that the plaintiff failed to prove this claim. The High Court also ordered the defendants to pay costs of RM30,000 to the plaintiff.

[26] Dissatisfied, the first defendant appealed. The second defendant did not appeal.

DECISION OF THE COURT OF APPEAL

[27] Having perused the appeal records and after hearing the submissions of learned counsel, we find that there are merits in the appeal. Our reasons are appended below.

THE COURT CANNOT CONSIDER ISSUES WHICH WERE NOT PLEADED

[28] It is trite that the court cannot consider issues which were not pleaded. The oft-cited case on this issue is that of *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; [1971] 1 LNS 42 where Sharma J, relying on the judgment of Scrutton LJ in the case of *Blay v Pollard & Morris* [1930] 1 KB 628, had this to say:

> A statement of claim and the defence (together with the reply, if any) constitute the pleadings in a civil action. It is on the examination of the pleadings that the Court notices the differences which exist between the contentions of the parties to the action. In the words the matters on which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. *The Court is not entitled to decide a 'suit on a matter on which no issue has been raised by the parties. It is not the duty of the Court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the Court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings.* The trial of a suit should be confined to the pleads on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the Court to come to a find into, different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ ... A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the Courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected. The faith and the confidence of the public in the law, the Constitution and the Government depends to a fairly large extent on the way the machinery of justice functions and it is the duty of those who man that machinery to realise that what they do does not in any way tend to diminish that faith.

[29] The decision of Sharma J has been approved by and relied upon by the highest court in the land, most recently the Federal Court in the cases of *Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal* [2015] 6 MLJ 492; [2015] 9 CLJ 153 and *SPM Membrane Switch Sdn Bhd v Kerajaan*

Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177.

[30] Therefore, it appeared to us that in granting judgment for the plaintiff based on the unpleaded share purchase price of RM3.67, the High Court had erred.

PRINCIPLES OF APPELLATE INTERVENTION

[31] The principles of appellate intervention are trite. The Court of Appeal will very rarely reverse a trial judge's findings of primary fact and then only if it is satisfied that the trial judge was plainly wrong (see for example *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, *UEM Group Berhad (dahulunya dikenali sebagai United Engineers (Malaysia) Berhad) v Genisys Integrated Engineers Pte Ltd & UEM Genisys Sdn Bhd and another appeal* [2010] MLJU 2179; [2010] 2 MLRA 668, the old English cases of *Yuill v Yuill* [1945] P 15 at p 19 per Lord Greene MR and *Thomas v Thomas* [1947] AC 484 per Lord Thankerton, and more recently in the United Kingdom, *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, *FAGE UK Ltd and another v Chobani UK Ltd and another* [2014] EWCA Civ 5; [2014] ETMR 26, *Henderson v Foxworth Investments Ltd and another* [2014] UKSC 41, *Carlyle v Royal Bank of Scotland plc* [2015] UKSC 13, *Watson Farley and Williams (a firm) v Ostrovizky* [2015] EWCA Civ 457 and *Elliston v Glencore Services (UK) Ltd* [2016] EWCA Civ 407).

[32] However, this is one of the rare cases where we are constrained to interfere with the decision of the learned judge. We find that the learned High Court judge erred in law and in fact when, having found that the plaintiff had failed to prove his claim for the purchase price of the shares at RM10.71 per unit, she went on to hold that the court was entitled and indeed, duty bound to make a decision on the actual purchase price of the shares. The High Court erred in finding that the actual purchase price of the shares was RM3.67 per unit, despite the fact that this price was not pleaded by the plaintiff and was only raised by his counsel during submissions.

[33] Further, if the High Court had conducted a thorough evaluation of the evidence, a red flag would have surely been raised from the fact that the plaintiff could not logically explain the reason for recording in Form 32A that the shares cost RM1 each, but alleged that there was an oral agreement between the parties that the shares would cost RM10.71 each.

[34] The learned High Court judge found that the price of RM10.71 per unit was unreasonably high to pay for the shares, considering the fact that from a valuation of the shares between the years 2006–2010, the value per unit only

fluctuated slightly, increasing slightly each passing year. At its lowest, the shares sold at RM2.40 per unit in 2006, while at its highest, the shares sold at RM3.67 in 2010.

[35] Even if there had been an agreement between the parties to falsify the consideration sum in Form 32A (which would have been an illegality), the learned High Court judge should not have awarded the plaintiff the price of the shares as computed in 2010 by the accountants. The transfer of the shares took place on 13 November 2007. Therefore, if at all the plaintiff is entitled to judgment, the High Court should have given judgment on the basis of the share price as at 2007, which the accountant found to be RM2.67 per unit.

[36] In any case, the learned High Court judge herself acknowledged in her grounds that the purchaser and the seller are free to agree to fix the contract price at any price ('Sebenarnya, harga saham boleh ditetapkan atas persetujuan pembeli dan penjual.'). Barring any convincing evidence to the contrary, the purchase price of the shares must be taken to be RM1 as per the Form 32A.

LIMITATION

[37] Having decided that the High Court had erred in giving judgment for the plaintiff on a claim which was not pleaded, it is not necessary for us to consider the issue of limitation as it is a moot point, as well as the issue of whether there was a contra arrangement. However, suffice for us to remark upon the lax attitude of the plaintiff in neglecting to issue a notice of demand to the defendants until after nearly seven years had passed from the date of transfer of the shares.

[38] Even if it was true that a solicitor had advised the plaintiff that he had no legal capacity to issue a notice of demand to the defendants, a consideration of the relevant dates would show that this argument is a mere afterthought. The plaintiff was only adjudged a bankrupt on 7 April 2010. Between the date of the transfer of the shares into the names of the defendants on 13 November 2007 and the date the plaintiff was adjudged bankrupt, nearly two years and five months elapsed. It is unreasonable for the plaintiff not to have engaged solicitors to issue a notice of demand to the defendants during this time period. This is especially the case since the plaintiff claimed that he needed the alleged purchase price of the shares in the sum of RM3m to be paid by the defendants in order to avoid bankruptcy.

[39] The court should not countenance the laxity on the part of litigants in pursuing their claims. It is for this reason the doctrine of limitation exists. In Malaysia, the legislation providing for the limitation of actions was enacted as the Limitation Act 1953 (revised 1981) (Act 254). Section 6 of the Limitation

Act 1953 provides that for actions such as the present which is premised on a breach of contract, that there is a time-bar after the expiry of six years from the date of accrual of the cause of action.

[40] In the renowned Supreme Court case of *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409; [1991] 2 CLJ 871; [1991] 1 CLJ Rep 69, Hashim Yeop Sani CJ (Malaya) stated the rationale for the doctrine of limitation as follows:

> The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.
>
> *The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation.* This is in accord with the maxim interest reipublicae ut sit finis litium that in the interest of the State there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

[41] Recently, this court in *Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuah, deceased) v Superintendent of Lands & Survey & Anor* [2013] 3 MLJ 666; [2012] 1 LNS 969 referred to and applied the case above.

[42] Therefore, even if the plaintiff applied to amend his pleadings or if for some other reason such as estoppel or admission, the defendants are barred from objecting to the share valuation at RM3.67, we find that the plaintiff has been 'sleeping on his rights' for nearly seven years and is not entitled to pursue this action, as it is barred by limitation.

CONCLUSION

[43] For the reasons stated above, we find that the learned High Court judge had erred in law and fact in allowing the plaintiff's claim on a basis that was never pleaded. The decision of the High Court is also inconsistent with the rejection of the plaintiff's claim for the sale of shares at RM10.71 per share. The court should have either accepted the case put forward by the plaintiff or rejected the same. Having decided to reject the plaintiff's claim for the share price at RM10.71, it was not open to the court, with the utmost respect, to formulate and make out a case for the plaintiff by finding that the plaintiff was entitled to the sale price of the subject shares at RM3.67 per unit. This latter claim was never pleaded and only sought as a compromise recourse by the plaintiff's counsel in the course of submissions well after trial. This comprises the primary reason for our allowing the appeal. Therefore, we set aside the decision of the High Court.

[44] We ordered costs of RM7,000 be paid by the plaintiff to the first defendant. The deposit is refunded to the first defendant.

Order accordingly.

Reported by Ashok Kumar